

NOTE CONCERNING GENERAL ORDER 2-35, DRUG TESTING

Perhaps no issue under the topic of management-employee relations sparks debate between strongly opposing viewpoints as much as drug testing. The DCJS model takes the stance that drug testing must be based on a reasonable suspicion, and that testing must not be a substitute for responsible supervision. Since the model policy on drug testing produced by the National Law Enforcement Policy Center (International Association of Chiefs of Police) supports random testing, the DCJS model offers an alternative. Some states such as New Jersey have mandated drug-testing programs for police officers that also do not rely on random drug tests. Additionally, the DCJS model discusses employees' 14th Amendment rights; current procedural guarantees; specific employee behaviors that would occasion a reasonable suspicion of drug-taking or alcohol abuse; the mechanics of the drug-testing process; confirmation of test results; chain of custody issues; disciplinary procedures; drug abuse counseling; plus sample forms for applicant consent and drug screening medical information.

A few specific issues need to be raised concerning the complexity of writing policy on drug testing.

1. Some agencies (including the federal government) give applicants notice--ten days--before appearing to take a drug test. Job advertisements must note the waiting period as well. The DCJS model policy does not include a waiting period.
2. Some agencies' drug-testing policies do not require that samples be coded before being sent to a testing laboratory, that is, coded to avoid labeling the sample with identifying information. The DCJS policy supports coded labeling on analogy with state HIV testing procedures.
3. The DCJS policy requires that confirmed positive results on tests be evaluated by a physician or other medical expert before the agency can discipline an officer.
4. Some agencies have mandated incident testing, that is, mandatory testing for drugs upon a serious vehicle accident or discharge of a firearm. This practice may present legal problems: agencies should consult legal advice before mandating such testing. The DCJS policy does not address the issue. Nevertheless, agencies that wish to write an order on incident testing might insert the following wording as IV.C.3:

3. *Employee testing in other circumstances*

a. *In the interest of the department and for the protection of the individual officer from subsequent allegations of impaired performance, the department shall require a urinalysis as soon as possible after any incident in which the officer is involved concerning:*

(1) *the discharge of a firearm;*

(2) *a motor vehicle accident causing serious injury or death in which he/she is the driver, or*

(3) *a similar serious mishap.*

5. Drug-testing plans must be reasonable. That fact that a threat to public safety by drug-taking officers justifies a testing program does not make the program reasonable. An unreasonable plan will be found unconstitutional.
6. Agencies might wish to add a section on emergency procedures for immediately relieving an officer from duty in case of drug impairment.
7. Agencies should carefully consider whether a drug-testing policy is even justified. Does the agency have evidence that a significant drug problem among officers exists? Has the agency tried alternatives to strict drug testing, such as creating employee assistance programs? Testing for substance abuse should occupy only a small percentage of an agency's substance abuse education and counseling program.
8. Section IV.G.2.e.1 requires a suspension without pay, but agencies may experience difficulties with officers who have sick leave available to cover the period of rehabilitation.

POLICE/SHERIFF'S DEPARTMENT		GENERAL ORDERS	
SUBJECT: Drug Testing		NUMBER: 2-35	
EFFECTIVE DATE: July 1, 1999		REVIEW DATE:	
AMENDS/SUPERSEDES: GO 2-35, October 1993		APPROVED: _____ Chief of Police/Sheriff	
CALEA STANDARDS: 32.2.7		VLEPSC STANDARDS: PER.03.05	

NOTE

This order is for internal use only, and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third-party claims. Violations of this directive, if proven, can only form the basis of a complaint by this department, and then only in a non-judicial administrative setting.

INDEX WORDS

Alcohol abuse
Drug testing
Reasonable suspicion
Searches; of employee workplaces
Urinalysis

I. POLICY

The department does not tolerate employees' use of illegal drugs nor the abuse of legally and commercially available ones. The courts have ruled that the threat to public safety by law-enforcement officers who use drugs or abuse alcohol is a legitimate reason for mandating drug/alcohol testing.

Drug abuse is a medical condition: employees shall seek medical assistance if they perceive a problem. Similarly, supervisors should know the working habits of their subordinates in order to observe behavior that might indicate substance abuse. Supervisors are responsible to instruct, guide, and counsel their subordinates, and to the department to ensure high standards of performance. Whenever possible, the department will assist employees to get help. The primary method for ensuring a drug-free workplace, however, shall be the proper performance of duties under proper supervision. The department must maintain a professional image before the community and shall relieve employees afflicted by substance

abuse from their law enforcement duties, either temporarily or permanently. Law enforcement officers who are drug abusers threaten the community. Illegal drug use breaks the law: employees who experiment with or routinely use illegal drugs have no place in law enforcement. Applicants shall undergo drug testing as part of a pre-employment physical examination. Further, routine scheduled physical examinations shall include drug testing. In cases of suspected or confirmed drug abuse, the chief/sheriff shall order an internal investigation. Most important, employees about whom the department has formulated a documented, reasonable suspicion of illegal drug use (or abuse of legally available drugs) shall submit to testing. The department shall not conduct random testing upon reassignment or promotion because it creates an atmosphere of suspicion, poor morale, and decreased productivity.

II. PURPOSE

The purpose of this general order is to offer guidelines to ensure an employee's drug-free status as a condition of employment, to ensure drug/alcohol tests are ordered for employees based on reasonable suspicion, and to provide procedures for drug/alcohol testing and the handling of cases of suspected drug abuse within the department.

III. DEFINITIONS

A. Drug abuse

Illegal use of controlled substances (as defined by state and federal laws, encompassing the use of narcotic and non-narcotic drugs, prescription drugs used abusively), and over-the-counter substances if they impair job performance.

B. Drug test

A urinalysis test to detect drugs, administered under approved medical conditions and procedures.

C. Employee

Any person employed by the department.

D. Reasonable suspicion

A ground for belief linked to articulable, objective facts or circumstances to warrant submitting an employee to testing. Reasonable suspicion must be documented before testing.

IV. PROCEDURES

A. General guidelines

1. Department employees shall not take any controlled substances unless prescribed by a person licensed to prescribe them.
 - a. Employees who take any drugs (prescriptions or over-the-counter) which may impair job performance must disclose this information to their immediate supervisor.
 - b. Any illegal use of drugs by an employee, whether on or off duty, is prohibited.
 - c. Employees shall report evidence of suspected drug abuse by another employee to their own supervisors.
2. All property belonging to the department may be inspected under certain circumstances. Personnel have a reasonable expectation of privacy in their desks, lockers, and offices.
 - a. If the department develops a reasonable suspicion that a search of an employee's workplace (or locker) will reveal evidence of work-related misconduct, the department may conduct a search related in scope to the reasonable suspicion.
 - b. Workplace searches may occur:
 - (1) To secure department property.
 - (2) To retrieve a file or agency documents.
 - (3) To seize evidence of work-related misconduct or poor performance.
 - (4) To gather evidence of criminal misconduct. In all cases, the searches must be reasonable. Any searches undertaken for reasons (3) and (4) require a reasonable suspicion of misconduct.
 - c. Workplace searches, conducted under reasonable suspicion, will take place upon reasonable notice to the employee, who may be present at the time of the search.
3. Failure to comply with this order may be grounds for discipline.

B. Legal issues

1. Fourth Amendment (searches and seizures)

The threat to public safety posed by law-enforcement employees who are drug or alcohol abusers is a legitimate factor in determining the reasonableness of a urinalysis. A urinalysis is not prohibited by the Fourth Amendment to the Constitution. A reasonable suspicion to require drug testing, however, is based on below factors which **do not** completely outweigh employees' Fourth Amendment rights:

- a. Public safety.
- b. Public trust and integrity.
- c. Potential for corruption.
- d. Presentation of credible testimony.
- e. Co-worker morale and safety.
- f. Loss of productivity.
- g. Civil liability (negligent hiring and retention).

2. Fourteenth Amendment (due process)

The department observes the due process rights of employees as guaranteed by the Fourteenth Amendment to the Constitution in the drug/alcohol testing program. The department uses adequate safeguards consistent with the Law Enforcement Officers' Procedural Guarantees [*Virginia Code 2.1-116.1* (Chapter 10.1)] to include the following:

- a. Employee notification.
- b. Reliable tests.
- c. Chain of custody of specimen.
- d. Confidentiality of test results.
- e. The right to appeal the findings.

- (1) Note that probationary employees maintain no Fourth Amendment property rights to employment. ***[Note: Agencies must stipulate under terms of employment that probationary employees may be dismissed any time without cause in order for (1) to be valid. In the interest of fairness, agencies may extend certain protections and guarantees to probationary employees.]***

3. Federal Rehabilitation Act

Under this statute, drug abuse is considered a handicap, but employees are protected only if the current use of drugs/alcohol does not impair job performance. It does not include any person whose alcohol/drug abuse constitutes a threat to the property or safety of others. Drug abusers who are neither rehabilitated nor in treatment are not handicapped persons within the meaning of this act.

C. Required drug tests

1. Applicant testing before hiring

- a. Applicants shall be tested routinely for drug and alcohol abuse as a part of their pre-employment physical exam if they meet the qualification under (1) below. (See Attachment A.)
 - (1) Drug testing shall only be required after a conditional offer of employment has been given.
 - (2) Since providing a urine sample for routine medical testing and screening is a normal part of a physical exam, no privacy interests are violated.
 - (3) The drug test shall be administered by the department physician at a medical site. An approved laboratory shall perform the analysis. See Section IV.E.
 - (4) The results of drug tests shall be kept confidential. Employees who breach confidentiality of testing information may be disciplined up to and including dismissal.
 - (a) Refusal to take the test or a positive test result shall be cause for excluding an applicant from consideration. The applicant may re-apply after one year. ***[Note: The agency may decide to allow a confirmation test***

at its expense to verify the result. Many agencies screen applicants on the basis of an initial screening. Testing of tenured employees, though, requires confirmation tests.]

- (b) If disqualification is based solely on a positive drug test, the chief of police/sheriff may permit an applicant to have further laboratory analysis of the specimen. If a split sample was taken, the second specimen may be tested at the applicant's expense.
- (c) If the applicant admits to prior involvement with drugs, the department shall ascertain the type and extent of drug abuse before making an employment decision.

2. Employee testing warranted by conduct

- a. When reasonable suspicion exists that an employee may be abusing alcohol or drugs, and this suspicion has been documented, the chief of police/sheriff may require the employee to undergo a urinalysis.
- b. Specific behaviors or deviations from expected performance that may justify ordering a urinalysis may include, but are not limited to, the following:
 - (1) Frequent absences/tardiness;
 - (2) Serious errors in judgment;
 - (3) Numerous accidents both on and off duty;
 - (4) Excessive force complaints;
 - (5) Chronic missed deadlines;
 - (6) Mood swings and unpredictable hostility;
 - (7) Repeated instances of violations of conduct.

Any one of the above behaviors alone may not justify testing. Supervisors must consider the employee's overall work performance.

- c. If another member of the department reports evidence of drug/alcohol abuse or makes an allegation of suspected drug abuse to a supervisor, that shall constitute reasonable suspicion. Unsubstantiated allegations are insufficient.
 - (1) The supervisor shall obtain a written statement from the employee alleging drug or alcohol abuse including all circumstances surrounding the complaint. Generally, the statement of another employee constitutes reasonable suspicion.
 - (2) The supervisor shall then prepare a report for an internal investigation.
 - (3) The accused employee will be requested to read and sign the notification of allegations form found in the appendix to RR 1-9.
 - (4) The supervisor, with the chief's/sheriff's permission, shall order the employee to undergo a urinalysis. He/she shall transport the employee to the department physician, if available, or to the nearest emergency medical treatment center. The employee may provide a blood test in lieu of a urinalysis.

D. Drug testing process

- 1. Urinalysis is the primary method for the screening of drug/alcohol abuse in employees.
 - a. The employee or applicant designated for a drug test must be positively identified by a photographic ID with an accompanying name and social security number before a sample is obtained.
 - b. The employee's supervisor shall notify the employee that drug screening through urinalysis will be required according to section III. C. of this order.
 - c. Skilled, trained personnel shall supervise and conduct all tests.
 - d. Both applicants and employees shall be tested at a medical site, preferably by the department physician, contract medical examiner, or medical technician. Specimen collection shall not demean, embarrass, or cause physical discomfort to the person tested.

- (1) The testing site shall be checked to ensure that it is private, secure, and clean.
 - (2) A toilet bluing agent shall be placed in the toilet bowl to ensure that the employee does not use toilet water to dilute the specimen.
 - (3) The employee shall remove any unnecessary outer garments such as a coat or jacket. All personal belongings such as a purse or briefcase shall be left outside the collection room. Employees may retain their wallets.
 - (4) The employee shall not run any water, flush the toilet, or handle anything else in the room otherwise the specimen will be discarded and the process must begin anew.
 - (5) The specimen collector shall not accompany the employee into a private toilet stall.
- e. Before the test, the employee must list all medication currently taken under medical supervision. (See Attachment B.) This form is **not** retained in any police records, nor is it reviewed by police personnel. **This form will be completed and submitted to the medical examiner reviewing the test results, and retained in medical files only.**

2. Initial screening test

- a. The urine sample is first tested through EMIT (Enzyme Multiplied Immunoassay Technique) because of its accuracy and relative low cost.
- b. The EMIT can test for most drugs including marijuana, cocaine, amphetamines, barbiturates, and opiates.
- c. False positives are possible on the initial screening because of any number of human, technological, or procedural errors. The initial screening test alone is insufficient as a basis for personnel decisions. The screening only eliminates drug-free specimens.
- d. An initial positive report should be classified as "confirmation pending," and does not confirm substance abuse.

- e. Notification of positive test results to the supervisor or internal affairs investigator or the person tested will be withheld until the confirmation test results are obtained.

3. Confirmation tests

- a. The GC/MS (Gas Chromatography/Mass Spectrometry), a highly reliable, sophisticated technique, constitutes the confirmation step. This test distinguishes between closely related compounds and its results are conclusive.
- b. In cases where the GC/MS test confirms the presence of a drug or drugs in the urine sample, the testing laboratory shall notify the chief of police/sheriff, who will notify both the internal affairs investigator and the employee's supervisor, and the investigation shall continue. The sample shall be retained for six months to allow further testing in case of dispute. The internal affairs investigator shall provide a copy of the positive confirmation test to the medical examiner who, upon consultation with the employee and upon reviewing the employee's medical history, will verify the confirmed test results.

4. Sample splitting

- a. As a safeguard for disputed results, the employee will have the option of submitting two samples. The urine samples must be taken at the same time and placed in two like specimen containers by the physician or medical technician. The physician or technician will write a code number on the sample corresponding with an entry on a confidential list giving the appropriate employee/applicant's social security number, date and place specimen was taken, and will write his/her own initials on the label. The laboratory will only receive samples so coded.
- b. One sample will be submitted for drug screening. The other sample will be stored frozen at the department or the medical facility or the laboratory for six months. This second sample shall be accessible to the employee or his/her attorney if the person disputes the results. The second sample may be tested if the chain of custody of the first sample is broken.

5. Chain of custody

- a. When the department receives a positive urinalysis report, the evidence custodian shall assume custody of the second urine specimen under secured storage.
- b. All samples shall be labeled with a code. The same holds true for samples retained in police custody: the evidence custodian shall maintain a confidential list giving the codes and the corresponding personal information about employees. The confidential list includes employees' names, social security numbers, date and place specimens were taken, and name and title of person(s) responsible for specimen collection.
- c. Each step in the processing of the specimen shall be documented to establish procedural integrity and the chain of custody.
- d. All persons who handle, transport, and conduct tests of samples shall sign for their receipt and release.
- e. The department shall minimize the number of persons handling specimens.
- f. Collection site personnel shall arrange to ship the specimens to the drug testing laboratory. Collection site personnel shall ensure that the chain of custody documentation is attached to each container sealed for shipment to the drug testing laboratory.
- g. Access to information about test results shall be given only to persons with a legitimate need to know, per order of the chief of police/sheriff. Employee or applicant identity shall be protected. Forms forwarded to the laboratory shall **not** contain the test subject's name.

E. Selecting a laboratory

- 1. The *[name the laboratory]* which processes all drug samples for the department is certified by the National Institute for Drug Abuse (NIDA) and is approved by the Department of Health and Human Services. This collection facility and their laboratory meet chain-of-custody procedures established by federal regulations.
- 2. The department shall periodically check on laboratory performance by sample splitting: a random number of samples are split and the two portions are sent to the laboratory with unique and different identification numbers so that the laboratory is not aware that the samples are duplicates. The

department ensures that at least 20% of all samples tested by the laboratory are blind quality control samples.

F. Drug test results

1. The laboratory shall notify the chief of police/sheriff immediately upon completion of the analysis.
2. The lab shall report as positive only those samples which have been confirmed to be positive for the presence of drugs.
3. All persons tested shall receive a hand-delivered letter from the chief of police/sheriff as soon after notification (of confirmation) by the lab as possible. The department shall provide a copy of the lab report to the person tested. In cases of negative laboratory reports, the employee may choose to have a copy placed in his or her personnel file.
4. A licensed physician will review all test results. In the case of positive results, the physician will meet with the employee, discuss the results of the test, and review the employee's biomedical history before verifying a positive test result. The chief of police/sheriff will not impose any discipline until receiving verification by the physician.

G. Disciplinary action

1. Every employee has due process rights under the department's disciplinary and grievance procedures. (See GO 1-7, employee discipline.)
2. In the case of an employee's confirmed positive drug test results, the department shall pursue an internal investigation. (See GO 1-9, complaints.)
3. The disciplinary actions available for drug violations are extended suspension with rehabilitation or termination.
4. The chief of police/sheriff may suspend with rehabilitation employees who abuse legally obtained prescription or over-the-counter drugs, or who come forward before being tested to seek help for their drug problems or who have mitigating factors to explain the temporary use of an illegal drug. This last consideration--the temporary use of an illegal drug--may subject the employee to a criminal prosecution. Any decision about illegal drug use not leading to prosecution will only be made in consultation with the department legal advisor or commonwealth's attorney.

- a. This alternative applies to the first offense only. Suspension shall be without pay and the department shall recommend community agencies for private rehabilitation.
- b. To return to duty, the employee must take the following steps:
 - (1) Complete a physical exam after treatment to determine fitness for duty.
 - (2) Authorize the release of the treatment facility's case files to the department for the purpose of evaluating the employee's fitness for duty.
 - (3) Submit to periodic, unannounced drug screening tests for one year after return to duty.
 - (4) Treatment records and the reason for suspension shall remain confidential.
- 5. The chief of police/sheriff shall terminate employment of any member who is a confirmed user of illegal drugs, who abuses legal drugs with no mitigating circumstances, and for a repeated offense after a suspension for one-time drug abuse.
 - a. After one year, an employee may re-apply for employment with the department with evidence of a negative drug test and/or rehabilitation. (See 4.b above.)
- 6. An employee may request a hearing from the chief of police/sheriff if he/she wishes to appeal the department's decision. If a split sample was taken, the second specimen may be tested at the employee's expense.

H. Drug abuse training

- 1. Drug abuse and drug testing training shall be developed and implemented for all members of the department. Training may be in the form of lectures, films, videos, or printed materials. The training officer shall be responsible for such training which includes the following topics:
 - a. Physiological and psychological aspects of addiction and specific information about major drugs of abuse, such as marijuana and cocaine, and abuse of alcohol.

- b. How to detect deteriorating work performance that may be related to drug or alcohol abuse.
 - c. Special issues surrounding drug abuse in the workplace (e.g., testing, drug trafficking).
 - d. Prevention and education strategies.
 - e. Stress management.
2. The department shall train supervisors both in general drug and alcohol abuse information as well as about their role in the referral process, including:
- a. Observing and documenting unsatisfactory job performance.
 - b. Notifying employees when their job performance is unacceptable.
 - c. Referring an employee for drug testing and rehabilitative resources.
 - d. Encouraging an atmosphere in which drug and alcohol abuse are not tolerated.

I. Resources for rehabilitation and information

1. Within the department *[Describe the available services, including:*
- a. Psychological services;*
 - b. Health insurance benefits for drug abuse treatment;*
 - c. Employee assistance program;*
 - d. Peer assistance program.]*
2. Within the community *[Describe the available services, including:*
- a. Inpatient chemical dependency programs (independent or associated with hospitals or medical centers);*
 - b. Outpatient treatment centers;*
 - c. Halfway houses and other residential treatment programs;*
 - d. Volunteer and self-help organizations;*

e. City or county-funded drug abuse prevention and education centers;

f. Local community mental health centers.]

3. State and national services

a. Virginia Department of Mental Health/Mental Retardation and Substance Abuse Services

Office of Substance Abuse Specialty Services
109 Governor Street
Post Office Box 1797
Richmond, VA 23214
804-786-3906

b. National Criminal Justice Reference Service (NCJRS)

1600 Research Boulevard
Rockville, MD 20850 or
Box 6000
Rockville, MD 20849-6000
1-800-851-3420
Web site: www.ncjrs.org/

ATTACHMENT A TO GO 2-35
DRUG SCREENING THROUGH URINALYSIS
APPLICANT CONSENT

I, _____, understand that as part of the pre-employment process, the *[your department]* will conduct a comprehensive background investigation in an effort to determine my suitability to fill the position for which I have applied. I further understand that as a part of the pre-employment process, I will be required to submit to and perform certain medical and physical examinations. In accordance with the efforts of the *[your department]* to select only those most qualified for law enforcement, I do hereby consent to the sampling and submission for testing of my urine or blood for the purpose of drug or alcohol screening. I understand that a negative result is a condition of employment. A negative result is a determination by a medical authority that drugs, alcohol, or other similar substances producing drug-like effects are not detectable in my metabolic systems, or are below legal limits.

I also understand that refusing to supply the required samples or producing a positively confirmed test result for the presence of prohibited drugs (illegal, controlled, or abused prescription drugs) will result in the rejection of my application for employment. I understand that a confirmed positive test result indicating the presence of drugs (as determined by medical authority) will bar me from securing future law-enforcement employment with this agency for a period of one year. I understand that after this one-year period, a positive test result may be considered in evaluating my fitness for future law-enforcement employment.

I understand that the results of the urinalysis will be provided to me as soon as possible after receipt by the *[your department]*.

I hereby acknowledge receipt of a copy of the methods and procedures for drug screening applicants for sworn law-enforcement positions.

Signature of Applicant

Signature of Witness

Date

Date

**ATTACHMENT B TO GO 2-35
DRUG SCREENING
MEDICATION INFORMATION**

In order to ensure the accuracy of established urine screening and confirmation procedures, I am providing the following information:

A. During the past 30 days I have taken the following prescription medications:

NAME OF MEDICATION	PRESCRIBING PHYSICIAN	DATE	LAST TAKEN
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1.

2.

3.

If you do not know the exact name of medication, indicate illnesses for which medication was prescribed in space designed for name of medication.

B. During the past 30 days, I have taken the following non-prescription medications (cough medicine, cold tablets, aspirin, etc.).

NON-PRESCRIPTION MEDICATION	DATE	LAST TAKEN
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1.

2.

3.

Signature of Witness

Signature of Applicant

Date

Print Applicant's Name